

Capital Bakers Division of Stroehmann Brothers Company and International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 463. Case 4-CA-12655

31 July 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
HUNTER AND DENNIS

On 9 March 1983 Administrative Law Judge Richard H. Beddow Jr. issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in response to the Respondent's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions only to the extent consistent with this Decision and Order.

The judge found that employee Davis engaged in strike misconduct, but that his misconduct was not so serious as to remove him from the protection of the Act. Accordingly, the judge found that the Respondent's termination of Davis violated Section 8(a)(1) and (3) of the Act. For the following reasons, we find that the Respondent lawfully terminated Davis.

On 20 December 1981 the Respondent's employees began an economic strike. On the second night of the strike, employee Davis and other individuals were picketing outside the gate to the Respondent's facility. Supervisor Coleman, driving a fast-food truck, approached the gate to leave the plant.

Davis and another employee stood in front of the truck and forced Coleman to stop. Other pickets shouted at Coleman and hit the truck with boards, breaking the windshield and the driver's side mirror. As Coleman inched the truck forward, Davis initially remained against the hood, then jumped onto the running board on the driver's side of the truck and banged on the window.

On 28 December 1981 the Respondent discharged Davis and other employees who had engaged in acts of violence against company property or endangered the health and welfare of employees.

In *Clear Pine Mouldings*, 268 NLRB 1044 (1984), we redefined the test for determining whether an employer's decision not to reinstate an employee who engaged in strike misconduct was lawful. We held that misconduct which, under the circum-

stances, reasonably tends to coerce or intimidate other individuals justifies an employer's refusal to reinstate the striker. We specifically noted, for example, that a striking employee has no right to block access to an employer's premises or to commit acts of violence against nonstriking employees or private property.

Applying the *Clear Pine* test to the present case, we find that Davis' acts exceeded the bounds of peaceful picketing and persuasion and were unprotected. Davis' acts of intimidation and violence—blocking a truck's exit from the Respondent's plant, jumping on the truck, and pounding on the truck's window—are each sufficient to warrant discharge, for each of these acts reasonably tended, under the circumstances, to coerce or intimidate. Accordingly, we conclude that the Respondent's discharge of Davis did not violate the Act.

ORDER

The complaint is dismissed.

MEMBER DENNIS, concurring.

Based on an examination of all the circumstances present in this case, I agree with my colleagues that the Respondent did not violate the Act when it discharged employee Davis because of his strike misconduct. Davis and another employee, picketing in front of the gate to the Respondent's facility, forced a truck driven by Supervisor Coleman leaving the facility to stop. While the truck was stopped, other pickets shouted at the driver, hit the truck with two-by-fours, shattered the windshield, broke the driver's side mirror, and bent the bracket into the truck.¹ During this incident, another truck arrived at the facility and stopped near the gate, waiting for Coleman's truck to depart. Some pickets approached the waiting truck and began pounding on it with boards. An employee (who was later discharged) smashed the side view mirror and threatened to drag the driver from the truck and "beat the shit out of" him.

I would find that, by his voluntary conduct, Davis acted in concert with his fellow pickets. Only by ignoring reality could one conclude that he did not play a role in the overall acts of violence. Davis was not a passive bystander who just happened to be in the area at the time, see *NLRB v. Juniata Packing Co.*, 464 F.2d 153, 155 (3d Cir. 1972), but a willing participant who aided in providing the opportunity for fellow strikers to attack and damage Coleman's truck, as well as to attack

¹ When Coleman's truck began to move through the pickets, Davis jumped on the running board and started to pound the driver's window. As a result of his exertions and the movement of the truck, he fell and slightly injured himself.

and damage another truck awaiting Coleman's departure. See *NLRB v. Fansteel Metallurgical Corp.*, 306 U.S. 240, 259-261 (1939); *North Cambria Fuel Co. v. NLRB*, 645 F.2d 177, 182 (3d Cir. 1981), *enfd.* 247 NLRB 1408 (1980).

In sum, I would find that Davis' active cooperation with fellow strikers who engaged in serious strike misconduct in the circumstances tends to coerce or intimidate and, accordingly, I agree that the Respondent's discharge of Davis did not violate the Act. See the concurring opinion in *Clear Pine Mouldings*, 268 NLRB 1044 (1984).

DECISION

STATEMENT OF THE CASE

RICHARD H. BEDDOW JR., Administrative Law Judge. This matter was heard in Philadelphia, Pennsylvania, on September 16 and 17, 1982. The proceeding is based on a charge filed on January 19, 1982, by the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 463 (the Union). The General Counsel's complaint alleges that Respondent, Capital Bakers (Division of Stroehmann Brothers Co.), violated Section 8(a)(1) and (3) of the Act by terminating its employees James R. Davis, Roy J. Washel, and James J. Waldron because they participated in a strike and work stoppage.

Briefs were filed by the General Counsel and Respondent. On a review of the entire record in this case and from my observation of the witnesses and their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is engaged in the manufacture and distribution of bread products. It maintains facilities in Williamsport and Bensalem, Pennsylvania, and annually purchases and receives goods and materials valued in excess of \$50,000 directly from Points outside of Pennsylvania. It admits that at all times material herein it is and has been an employer engaged in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The Union, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local No. 463, is now and has been at all times material herein a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICE

In October 1980, the Union was certified as the bargaining representative for a unit of driver-salesmen, mechanics, and packers at Capital Bakers' Bensalem facility. The Union began negotiations; however, no contract was reached and a strike began on December 20, 1981.

In anticipation of the strike, Respondent established a duty management team to control and document the activities of the strike and to take care of service of all customers. In addition, the Company contracted for the services of Associated Securities Specialists, a guard agency, and its employees monitored picketline activity.

The picketing began on December 20, at approximately 9:30 p.m.¹ By midnight, approximately 40 people were picketing in front of the gate by Respondent's facility. Fires had been lit in two oil drums on either side of the gate. The picketers fed the fire with scrap wood and skids which they found in the nearby Industrial Park, and they sometimes stopped walking and congregated by the fires to warm themselves.

Shortly before midnight, when a small pickup truck occupied by a security guard Brenda Bohn attempted to leave through the gate, the pickets forced it to a stop, exchanged words with the driver, and inflicted some damage on the vehicle including the tearing off of a CB antenna. The guard left and, when she later returned, she described who had ripped off her CB antenna to management personnel and went back outside, where she pointed out the person and was told it was Roy Washel. She subsequently saw Washel on several occasions and each time identified him as the individual responsible for tearing the antenna off her truck.

On the second night of the strike, after midnight on December 22, six or more people, including James Davis, reported for picket duty in accordance with a schedule prepared by Ed Henderson, the union business agent. They picketed in a circle about 10 feet away from the gate and again set fires on either side of the gate. That night, sometime between midnight and 1 a.m., a 45-foot tractor-trailer from Respondent's Harrisburg facility approached. The driver, Thomas Billet, a member of another union, swung around and stopped approximately 50 feet from the gate in a position to back through. At the same time, one of Respondent's supervisors, Matthew Coleman, attempted to leave in a 22-foot-long fast food truck as two security guards opened the gate. As Coleman drove out the gate at a slow rate of speed, James Davis and another unidentified picketer stood in front while other pickets were on either side. As Coleman inched out of the gate, his truck came into contact with Davis. At this point Coleman came to a stop for a few minutes, half out of the gate. He noted that Davis had his hands on the truck's front and was sliding backwards. Other pickets shouted at Coleman and hit the truck. Coleman heard breaking glass. Davis then climbed onto the running board of the truck adjacent to the driver's

¹ Testimony regarding the occurrences on the picket line were made by four of the striking employees (including the three alleged discriminatees), a supervisor, a nonstriking driver from another one of Respondent's plants, and two security guards. No two recollections, including those of the two guards who at times were standing side by side, are totally or significantly similar to those of any other witness. Under these circumstances, the facts are being set forth as a synthesis of the credited parts of their testimony based on the demeanor of the witnesses and appropriate consideration of the logical consistency and inherent probability of the facts found. To the extent that evidence not mentioned herein might appear to contradict my factfindings, that evidence has not been disregarded but has been rejected as noncredible, lacking in probative worth, surplusage, or irrelevant. See *R & S Transport*, 255 NLRB 346 (1981).

side by putting his left hand on the mirror adjacent to the driver's side of the vehicle and pulling himself up. Davis attempted to yell at Coleman about being hit and banged on the window to get Coleman's attention. Coleman started to drive off and Davis, grabbing onto the driver's side mirror with one hand, held on until he fell off and was slightly injured as the truck picked up speed and the driver's door swung open at a point adjacent to Billet's tractor-trailer. Meanwhile, other pickets were banging on both trucks with boards.

Roy Washel and James Waldron were both present during the above-described incident which also included acts of rock and bottle throwing. Washel was specifically seen hitting Coleman's truck with a 2-by-4 board on the hood of the passenger's side. Billet subsequently identified Washel, who is a large man, as the person who smashed his rearview mirror with a board and then threatened to drag him out and beat him up.

Because of the violent acts on the second night of picketing, Respondent sought and obtained an injunction which went into effect on December 23. Following issuance of the injunction, the picketline calmed down. On December 28, 1981, however, in separate incidents three of Respondent's trucks were damaged away from the picketline as company supervisors were making deliveries in downtown Philadelphia. The incidents occurred within blocks and minutes of each other and all involved similar kinds of damage.

On the morning of December 28 as Supervisor Coleman was on his way to make a delivery, he saw a car resembling that of striker Roy Washel (Coleman had ridden in Washel's car before). After pulling over to the curb at his delivery location, Coleman observed that, in fact, Washel was driving the car. A few minutes later, as Coleman was in the forward part of his truck's cargo compartment preparing to make a delivery, he heard a noise at the back of the truck, turned, saw James Waldron pull down the overhead door, and heard the door latch being locked. He was unable to get out until he was released by an unidentified cab driver who had seen the incident. In the meantime, he heard a noise coming from the truck's cab. After his release from the back of the truck, Coleman noticed that a stack of rolls he had already placed by the side of the truck had been knocked over. He then went to the front of the truck to investigate and found that his paperwork had been taken, wires had been pulled down from under the dashboard, and the truck's choke cable had been ripped out. Later, as he attempted to drive the truck, a fire started.

Near the same time and in the same vicinity, Supervisor Robert Henderson was making a delivery when a large young man, later identified as Washel, pushed over his bread rolls and took a swing at Henderson and then pushed him over the baskets of rolls. Henderson also observed a second man across the street from where he was making his delivery. The second individual was later identified as Waldron and was seen joining Washel as they walked away.² Henderson then examined his truck

and found that its radiator had been punctured and that rolls had been dumped on the ground.

A third company truck was also vandalized at approximately the same time, again approximately three blocks from where Coleman was locked in the back of his truck. The driver, Supervisor Frank Diccicco, returned to his truck after making a delivery to find that three of four stacks of product had been pulled off the van of the truck and strewn on the ground, that his paperwork was missing, and that his radiator had been punctured. Diccicco, however, did not see anyone.

In accordance with procedures established by Respondent at the beginning of the strike, the events were reported to the Company and to the police. After being advised of what had occurred, Terrence Maurer, Respondent's vice president and senior manager, decided that all employees who had been identified as having engaged in acts of violence against company property or who had endangered the health and welfare of employees should be terminated. On the afternoon of December 28, 1981, he directed that letters be sent terminating Davis, Waldron, and Washel.

Davis had been a truckdriver for Respondent for 2 years. He picketed only on the first and second nights of the strike. On December 28, 1981, he was sent a letter informing him that he was terminated for picket line misconduct because of the incident involving Coleman's truck on December 22. Davis' recollection of the event was that after the truck touched him as Coleman was attempting to leave, he climbed on to ask why Coleman hit him but that Coleman took off before he did anything more than call Coleman's first name. He also claimed that he did not hit the windshield or window and testified that he did not threaten or intend to threaten Coleman.

Washel and Waldron had also worked as drivers for Respondent for several years. Both were notified by letter of December 28, 1981, that they were terminated because of their misconduct during the strike. Respondent's reasons were based on their conduct on December 28 in Philadelphia, as well as on the picket line. Washel picketed Respondent's facility during the strike every day from December 20 until December 31, with the exception of Christmas Eve. Washel was assigned picket duty from 12 midnight to 4 a.m.

Washel denied that he threw any object at the truck on the first night of the strike, that he hit any truck with a 2-by-4 board on December 22, nor that he broke a mirror on any truck; however, his testimony is not credited as being an accurate recollection of the incidents. With respect to the alleged Center City incident, Washel denied that he was even in Center City, Philadelphia, at the time of the alleged Henderson incident claiming that after picket duty, from 12 midnight to 4 a.m., he went home at 4:30 a.m. and was in bed sleeping until 6:30 a.m., at which time his wife testified that she left to go to work. He also testified that prior to picketing on December 28 he was at home where he drank between a case

² Henderson was from another one of Respondent's plants and did not know either Washel or Waldron before the incident, but described

Washel to Coleman on the day in question and subsequently identified both Washel and Waldron.

and a case-and-a-half of beer. As noted above, I credit the testimony of other witnesses to the effect that Washel was seen in downtown Philadelphia between 5:30 a.m. and 6 a.m. on December 28.³

Waldron also denies that he was in downtown Philadelphia in the early morning hours of December 28 and in support thereof relies on a picket schedule that shows him as picket captain for the period between 4 and 8 a.m. I note, however, that Waldron displayed an evasive demeanor while responding to questions and, as noted above, I credit the testimony of witnesses who identified Waldron as being seen at the locations where misconduct occurred in downtown Philadelphia (as noted by the Respondent, none of the five persons who were listed as being on picket duty at the critical time were called to verify Waldron's assertions).

IV. DISCUSSION

The record shows here that the Union was engaged in an economic strike when certain alleged acts of misconduct occurred both on and off the picket line. Three striking employees were specifically identified as having participated in the alleged acts and were terminated.

Under normal circumstances, striking employees cannot discriminatorily be terminated or denied reinstatement because of their participation in picketing, which is a protected concerted activity. However, under certain circumstances, an employer can be justified in discharging or failing to reinstate an employee if it shows an honest belief that the employee has participated in strike misconduct. If an employer establishes such a defense, the General Counsel must then come forward with evidence that the employee did not engage in the conduct asserted or that such conduct was protected. The burden then shifts back to the employer to rebut such evidence. *General Telephone Co. of Michigan*, 251 NLRB 737 (1980). A striking employee who engages in serious misconduct, including misconduct in the nature of blocking plant entrances, may lose the Act's protection and subject himself to discharge. See *Leon Ferenback, Inc.*, 212 NLRB 896 (1974). However, as noted in *Coronet Casuals*, 207 NLRB 304 (1973):

... it is true that not every impropriety committed in the course of a strike deprives an employee of the protective mantle of the Act. Thus, absent violence, the Board and the courts have held that a picket is not disqualified from reinstatement despite participation in various incidents of misconduct which include using obscene language, making abusive threats against nonstrikers, engaging in minor scuffles and disorderly arguments, momentarily blocking cars by mass picketing, and engaging in other minor incidents of misconduct. [Citations omitted.]

³ Although there also was some conflicting testimony regarding Washel's wearing of a colored cap and his ownership of only a gray cap, it was possible for him to be wearing someone else's cap and his testimony is insufficient to disqualify the credibility of the identifications made by several of Respondent's witnesses.

A. The Discharges of Washel and Waldron

The Respondent has shown that it had an honest belief that both Roy Washel and James Waldron engaged in serious and repeated strike misconduct at the time the decision was made that they would be terminated. The principal incidents of misconduct appear to have been those that occurred in downtown Philadelphia on the morning of December 28, 1981; however, Respondent's justification was reinforced by the identification of Washel as the person who had ripped off the CB antenna of Security Guard Bohn on the first night of the strike. Also on December 22, the second night of the strike, Washel was identified as the person who smashed truckdriver Billet's rearview mirror and who threatened to beat him up. Washel also was identified as the one who was seen hitting the hood of Coleman's truck with a 2-by-4 board.

Returning to the incidents of December 28, Washel was specifically identified as the one who swung at Supervisor Henderson and pushed him over some baskets of rolls as Waldron was walking nearby. Moments later it was discovered that water was running from Henderson's punctured truck radiator. Within a few blocks and a few minutes of the Henderson incident Coleman saw Washel following Respondent's truck and then saw Waldron imprison him in the back of the truck as Coleman prepared to make a delivery. When a cab driver released him moments later, Coleman discovered his rolls had been knocked over and wires ripped from his dashboard.

Although the General Counsel has attempted to show that Washel and Waldron were incorrectly identified as being the ones who engaged in the incidents of misconduct, I do not find their testimony believable. To the contrary, the description of the incidents otherwise set forth above are found to be credible and conclusively shows that serious misconduct occurred which is properly attributable to both Washel and Waldron. See *K & K Transportation*, 262 NLRB 1481 (1982).

I further find that their acts of misconduct, which included physical violence, imprisonment, and sabotage at a location removed from the picket line, are not shown to be impulsive, unpremeditated behavior or acts of an insignificant nature that otherwise might be qualified as protected.

Under these circumstances, I find that the General Counsel has failed to overcome the Respondent's showing of an honest belief in the serious misconduct of strikers Washel and Waldron by proving that they did not engage in the misconduct or that it otherwise was a protected activity. Accordingly, it cannot be found that Respondent's termination of strikers Roy Washel and James Waldron was a violation of Section 8(a)(1) and (3) of the Act, and it is recommended that the charges in this respect be dismissed.

B. The Discharge of Davis

Respondent learned that James Davis was injured when he fell off a moving truck leaving the yard at a time when several violent acts occurred. The basic misconduct attributed to Davis was his jumping on the running board of the truck and pounding on its windshield. One security guard attributed some breaking of glass to

Davis; however, his supervisor who was standing nearby, did not. Moreover, the truckdriver, Supervisor Coleman, indicated that the glass breakage occurred before Davis climbed on the running board and he did not claim that Davis was responsible for the damage to his vehicle. Accordingly, I cannot find that the Respondent had a good-faith belief that Davis was responsible for any serious picket line misconduct when he was terminated on December 28, 1981. I find that Davis was singled out for discharge with Washel and Waldron merely because he had been specifically identified through the notoriety of his injury when he fell from the truck and because Respondent was aggravated as a result of the misconduct which occurred in Philadelphia on the morning of December 28.

The record is clear that Davis did not engage in any other incidents of misconduct. Davis is not linked to any specific damage to the truck; he is not shown to have done anything else that would show any general proclivity to engage in misconduct; and the mere beating on a windshield, standing alone, is not so serious as to remove him from the protection of the Act. See *Chevron U.S.A.*, 255 NLRB 1380 (1981). Further, his conduct after being hit or pushed by the truck attempting to leave is not inconsistent with a spontaneous, impulsive reaction and, inasmuch as it did not escalate into a further violent action, it cannot be regarded as serious or outrageous conduct that would invalidate the employee's protection under the Act. See *Coronet Casuals*, supra.

Accordingly, I find that in regard to the discharge of James Davis, the General Counsel has met its overall burden of proof and has persuasively shown that Re-

spondent's termination of Davis violated Section 8(a)(1) and (3) of the Act as alleged.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By discharging James R. Davis on December 28, 1981, Respondent engaged in an unfair labor practice in violation of Section 8(a)(1) and (3) of the Act.
4. Except as found herein, Respondent has not engaged in any other unfair labor practices as alleged in the complaint.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order the Respondent to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily discharged one employee, James R. Davis, I find it necessary to order it to offer Davis reinstatement with compensation for loss of pay and other benefits, in accordance with *F. W. Woolworth*, 90 NLRB 289 (1950), plus interest as computed in *Florida Steel Corp.*, 231 NLRB 651 (1977). See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962). Inasmuch as the Respondent has not engaged in such misconduct as to demonstrate a general disregard for the fundamental rights of employees, I find it unnecessary to recommend issuance of a broad order.

[Recommended Order omitted from publication.]